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DATO' SERI TIMOR SHAH RAFIQ v. NAUTILUS TUG & TOWAGE SDN BHD

HIGH COURT, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[ORIGINATING SUMMONS NO: WA-24NCC-179-04-2016]
B 15 MARCH 2017

COMPANY LAW: *Accounts – Inspection, application for – Rights of inspection as director – Whether director entitled to inspect accounts – Whether rights unfettered – Whether right to inspect connected to discharge of director's duties – Whether right not available if bad faith proved – Whether director obliged to provide reason for request – Whether requirements of s. 167(6) of Companies Act 1965 complied with*

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The plaintiff, a director of the defendant, had complained that there were serious accounting irregularities in the defendant's audited accounts, in that, among others, the defendant's audited accounts allegedly classified accrued liabilities in excess of RM3 million as contingent liabilities, thereby wrongly inflating the profits of the company. Thus, the plaintiff had on numerous occasions requested for a copy of certain accounting and other records ('accounting records') of the defendant. The defendant however refused the request for the latter to be furnished with copies of the documents, and insisted that the accounting records 'are kept in the office and can be viewed any time by the directors'. Other than the denial, the defendant was also against the plaintiff's request for his auditor of choice to be allowed to inspect the accounting records. Hence, the plaintiff *vide* encl. 1 sought for an order of the court to enable him to (i) inspect and make copies of the accounting records of the defendant, for the appointment of an auditor to assist him for such purpose; and (ii) for the defendant to supply to the plaintiff a copy of the accounting records.

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Held (allowing encl. 1 with costs):

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(1) The statute provides for the obligation of every company and director of the company to keep accounting records under s. 167(1) of the Companies Act 1965 ('the CA'). The right of the directors of the company to inspect the accounting records is provided under s. 167(3) of the CA, and the court may order inspection of the accounting records by an auditor acting for a director under s. 167(6) of the CA. These provisions are repeated in s. 245 of the new Companies Act 2016. Thus, it is settled law that directors have unrestricted and direct access to such company information. The right of a director to inspect documents of a company is mandatory in order to enable a director to discharge his responsibilities fairly and equitably for the benefit of the company and the shareholders. (paras 16 & 17, 18)

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(2) The obligation of the company to allow inspection by its director is mandatory, and the right is absolute so long as the right is exercised for the proper performance of the director's duties to the company and not with a view to causing any detriment to the company. A director is *prima facie* entitled to inspection and is not obliged under the law to justify his request to inspect the accounts of the company. However, a director's statutory right of inspection may only be refused if the director is exercising his right of inspection for some ulterior purpose or to injure the company. Despite the defendant raising various complaints, none however has been shown to even remotely come close to constitute any form of clear evidence of improper or ulterior motive on the part of the plaintiff that could justify denial of inspection rights under s. 167(3) in encl. 1. (paras 21, 22, 26 & 68)

(3) Given these positive duties and potential liabilities, the law accords company directors a virtually absolute and unqualified right to inspect the corporate books of the company they are responsible for. This cannot be interpreted as being merely confined to the right of the directors to view documents at a specified place in the premises of the company and not extended to the right to ask for copies be made for the requesting directors. The jurisprudential basis for the directors' inspection right therefore equally applies to the right to make copies of the documents so inspected. (paras 39 & 41)

(4) The defendant's suggestion that the plaintiff was not entitled to encl. 1, *inter alia*, because he was a foreign national who resided overseas, or that the plaintiff was a non-executive was entirely devoid of merit. The law, as clearly encapsulated in ss. 131B and 132 of the CA, did not make a distinction on the powers and duties of company directors on the basis of nationality, residence, or whether the director was performing an executive role or otherwise, or whether the director was a nominee or a corporate representative of a shareholder. It is a fundamental principle of company law that the right to inspect emanated from the plaintiff's office as a director of the defendant company. Directors of a company enjoy the same right of inspection under the law. The law admits to no distinction between the statutory and fiduciary duties owed by different categories of directors. (para 54)

(5) The key prayer in encl. 1 was for the plaintiff's own auditor to undertake an inspection on behalf of the plaintiff as permitted under s. 167(6) of the CA. It was well-within the plaintiff's right to make such application, more so as he was not an auditor and thus required the assistance of an approved company auditor to conduct the inspection of the defendant's accounting records. Having regard to the circumstances of encl. 1, there was sufficient basis to grant the application under s. 167(6) for the

A appointment of the identified and proposed auditor to assist the plaintiff in the exercise of the latter's inspection rights inclusive of the right to take copies of documents, subject to the requisite confidentiality undertaking. (paras 75 & 85)

Case(s) referred to:

B *Deluge Holdings Pty Ltd & Anor v. Bowlay & Ors [1991] 9 ACLC 1486* ***(refd)***
Edman v. Ross (1922) 22 SR (NSW) 351 ***(refd)***
Law Wai Duen v. Boldwin Construction Co Ltd [2001] HKCA 284 ***(refd)***
Loh Yoon Sang v. Ivory Pearl Sdn Bhd [2003] 7 CLJ 405 HC ***(refd)***
Mageswary Kannaiah v. Vithylingam Mayandy & Anor [2009] 9 CLJ 40 HC ***(refd)***
Mirza Mohamed Tariq Beg Mirza HH Beg v. Perunding Pakarmedia Sdn Bhd [2009] 10
C *CLJ 273 HC* ***(refd)***
Oxford Legal Group Ltd v. Sibbasbridge Services Plc & Anor [2008] EWCA Civ 387 ***(refd)***
Paul Nicholson lwn. Faber Medi-Serve Sdn Bhd & Satu Lagi [2002] 5 CLJ 383 HC ***(refd)***
Soo Boon Siong v. Saw Fatt Seong & Ors [2008] 1 CLJ 365 CA ***(refd)***
Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd [2008] 1 LNS 741 CA ***(refd)***
D *Welch v. Britannia Industries Pte Ltd [1992] 3 SLR (R) 64* ***(refd)***
Wuu Khek Chiang George v. ECRC Land Pte Ltd [1999] 3 SLR 65 ***(refd)***

Legislation referred to:

Companies Act 1965 (since repealed), ss. 131B, 132, 167(1), (3), (6), (7)
Companies Act 2016, ss. 245(1), (9), 359(2)

E Companies Act (Cap 50) [Sing], s. 199

For the plaintiff - KL Pang & Shelby Chin; M/s Cheah Teh & Su
For the defendant - SY Ng, David Peter & CY Teoh; M/s Jerald Gomez & Assocs

Reported by Sandra Gabriel

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JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

G **[1]** This is an application by a director to inspect and make copies of the financial records of the company he serves, and for the appointment of an auditor to assist him for such purpose.

[2] I granted the application at the conclusion of the hearing, and highlighted the key grounds for my decision. This judgment contains the full H reasons for my decision.

Key Background Facts

[3] The reliefs sought by the plaintiff are straightforward enough. He seeks, in encl. 1, an order that:

I (i) the accounting and other records ("accounting records") of the defendant be open to inspection and be available for copying by an approved company auditor for the plaintiff; and

(ii) the defendant do supply to the plaintiff a copy of the accounting records listed in Annexure B to encl. 1.

[4] It is noted that in support of encl. 1, the plaintiff's agent, being an approved company auditor has provided the requisite undertaking to this court that information acquired during the inspection shall not be disclosed except to the plaintiff.

[5] The plaintiff is a director of the defendant. This is an undisputed fact. Neither has the defendant any complaints about the status of the directorship of the plaintiff, in that the latter is a non-executive director and is one of the nominee directors for the minority shareholder of the defendant, namely Nautical Supreme Sdn Bhd ("NSSB"). The majority shareholder of the defendant, Azimuth Marine Sdn Bhd ("AMSB"), controls the Board of Directors of the company by virtue of having the right to appoint more nominee directors.

Essence Of The Stance Of The Litigants

[6] It is the contention of the plaintiff that he had on numerous occasions, either by email communication or during the Board meetings on 12 August 2015, 19 August 2015, 17 September 2015, 27 September 2015, 30 October 2015, 13 November 2015, 7 March 2016 and 1 April 2016 requested for a copy of certain particulars of the accounting records, as particularised in Annexure B of encl. 1. It is important that the information for which copies of documents are requested by the plaintiff be fully set out. These are as follows:

Lists of documents

A. Harbour tugs costs - RM68,500,000

1. Progress claims and/or invoices from Shin Yang Shipyard made up to USD68,500,000.
2. Payment vouchers/bank and/or advice/cheque image or any other mode of payment with supporting documents from banks paid to Shin Yang Shipyard.
3. Working and/or computation of late delivery chargers (for delay in delivery of harbour tug boats).
4. Supporting documents of rebates received from Shin Yang Shipyard.

B. Interest during construction (EXIM) - USD1,608,963

1. All statement of loan document from EXIM Bank.
2. Working for amount of interest capitalised for FYE2013 - FYE2015.

C. Interest during construction (shareholders' advance) - USD1,250,772

1. Working for amount of interest accrued (capitalised) and/or expensed off) for FYE2013 - FYE2015.

D. Supervision fee & pre-operating expenses - USD1,423,095

1. Breakdown between supervision fee and pre-operating expenses.
2. Detailed computation of supervision fees to arrive at the amount capitalised and payable to Azimuth Ship Management Sdn Bhd.
3. What is the amount outstanding as at 30 September 2015.
4. Invoices for all pre-operation expenses.
5. Any supervision fees not yet taken up as at 30 September 2015.

E. Mobilisation pre-operating expenses - USD770,000

1. Invoices and payment vouchers for mobilisation pre-operating expenses.

F. Legal fee - USD283,039

1. Invoices and payment vouchers for legal fees.

G. Advisory fee paid to Nautical Supreme Sdn Bhd - USD155,433

1. Detailed computation of amount capitalised.
2. What is the amount outstanding as at 30 September 2015.

H. Fuel on board - USD108,942

1. Invoices and payment vouchers for fuel on board.

I. Insurance premium for harbour tugboats

1. Invoices and payment vouchers for insurance premium.
2. All insurance policies for tugboats.

J. Bank accounts

1. Bank statements for all bank accounts since incorporation.
2. Bank reconciliation for all bank statements as the amount do not reconcile with that as reflected in the general ledger.

K. Creditors

1. All creditors statements from Shin Yang Shipyard.

L. Revenue

1. All invoices issued to Vale Malaysia Minerals Sdn Bhd.
2. Working and/or Computation of revenue tied to Revenue for FYE2015.

M. Cost of sale

1. Invoices and/or payment vouchers for cost of sale for FYE2015.

N. Forex loss

1. Detailed workings for the forex loss of USD94,560.

O. Facility fees

1. Loan statement from EXIM Bank to show facility fee charged to accounts for FYE2015.

[7] It is the position of the defendant, and as made clear to the plaintiff, that the former refused the request for the latter be furnished with copies of the documents, and the defendant insisted on 11 March 2016 that the accounting records "are kept in the office and can be viewed anytime by the directors".

[8] Various other efforts undertaken by the plaintiff towards obtaining copies of the documents were not successful. Thus, other than the denial by the defendant for copies be given when the plaintiff attended in person at the office of the defendant to inspect the accounting records on 22 April 2016, the Board of the defendant company, controlled by AMSB nominee directors had also voted against the plaintiff's request for his auditor of choice be allowed to inspect the accounting records.

[9] The defendant, additionally, did not answer specific questions on accounting matters sent in an e-mail dated 1 April 2016 by the plaintiff. The plaintiff also claimed the defendant purported to offer verbal answers to the written questions posed earlier, but refused to cooperate by providing written answers.

[10] The plaintiff's complaint however is his contention that there appears to be serious accounting irregularities in the defendant's audited accounts for the year ended 30 September 2015, in that, among others, the defendant's audited accounts allegedly classified accrued liabilities in excess of RM3 million as contingent liabilities, thereby wrongly inflating the profits of the company.

[11] The defendant on the other hand, raised various complaints against the action filed by the plaintiff. It is contended that the prayers sought by the plaintiff to be uncertain or excessive. It further contends that the plaintiff is acting in complete abuse of court process by seeking relief from this court, for an ulterior purpose and for an improper motive, and that he has not come to court with clean hands.

[12] It further suggested that there was no cogent reasons nor meritorious issues on any financial matters for inspection especially since the plaintiff had in fact, it was claimed, carried out a full inspection of the accounting records on 22 April 2016. He should have thereafter raised any concerns at Board

meetings of the defendant company. The defendant asserted that the action is for the ulterior purpose of asserting pressure on the defendant and AMSB to make payments to NSSB, which had since stopped.

[13] The defendant reiterated that the plaintiff has never been denied his right to inspect, but that this right does not entitle the plaintiff to be given copies of the documents, nor to have them sent to some unknown third parties for their opinions.

Evaluation And Findings Of This Court

The Law

[14] The company law in this country has fairly clearly established the governing requirements relating to the inspection rights of company documents by its own directors.

[15] First, the key legislative provisions. These are found in the Companies Act 1965 ("the CA"), primarily in s. 167, the relevant parts of which read as follows:

> 167. Accounts to be kept
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> **(1) Every company and the directors and managers thereof shall cause to be kept such accounting and other records** as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.
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> ...
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> (3) The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place in Malaysia as the directors think fit and **shall at all times be open to inspection by the directors.**
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> ...
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> (6) The Court may in any particular case order that the accounting and other records of a company **be open to inspection by an approved company auditor acting for a director,** but only upon an undertaking in writing given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.
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> (7) If default is made in complying with this section **the company and every officer of the company who is in default shall be guilty of an offence against this Act.**
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> Penalty: Imprisonment of six months or five thousand ringgit or both.
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> (emphasis added)

[16] Thus the statute provides for the obligation of every company and director of the company to keep accounting records under s. 167(1), the right of the directors of the company to inspect the accounting records (s. 167(3)), and the court may order inspection of the accounting records by an auditor acting for a director (s. 167(6)).

[17] I should add that these provisions are repeated in the new Companies Act 2016. They are now contained in the new s. 245. As such, case law authorities, especially local decisions, some of which will be highlighted herein, would continue to be of direct relevance when interpreting situations which are subject to the new Companies Act 2016. The one significant substantive change introduced in the Companies Act 2016 are the considerably heavier penalties for contravention of the requirements of s. 245. From a fine of a mere RM5,000 or a term of imprisonment of six months or both, as stated in s. 167(7) of the CA, to a maximum fine of RM500,000 or a jail term not exceeding three years or to both, as stipulated in s. 245(9) of the Companies Act 2016.

Unbridled Right Of Inspection

[18] In relation to these statutory provisions, it is settled law that directors have unrestricted and direct access to such company information. The right of a director to inspect documents of a company is mandatory in order to enable a director to discharge his responsibilities fairly and equitably for the benefit of the company and the shareholders. Thus in *Paul Nicholson lwn. Faber Medi-Serve Sdn Bhd & Satu Lagi* [2002] 5 CLJ 383; [2002] 1 MLJ 355 the High Court (in the English translation in the headnotes) held as follows:

> (1) *The right of a director to inspect the company's documents was a mandatory right provided under s. 167 of the Act.* This statutory right was given so that the director could discharge his responsibilities fairly and equitably for the benefit of the company and the shareholders. The director was entitled to be informed regarding matters that had occurred in the company and such information could be obtained from the company's documents (see p 360G-I).
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> (2) *Section 167(3) of the Act conferred an absolute right to the director to inspect the company's documents and records. Therefore, the conditional consent given by the first defendant to the plaintiff's request for information was a denial of that absolute right* (see p 361C-D).
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> (3) There was no necessity for the plaintiff to give the undertaking as requested by the first defendant, as there were legal provisions to provide for the same. Accordingly, the auditor appointed to assist the plaintiff was required to give to the court an undertaking that he would not disclose any information obtained in the course of the audit. This was clearly consistent with the provisions of s 167(6) of the Act (see p 361G-H).
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> (emphasis added)

[19] The leading authority on the subject to date is the Court of Appeal decision in *Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* [2008] 1 LNS 741; [2009] 2 MLJ 527 which further affirmed the position in law as follows:

> [28] In our view, s. 167(6) is intended to facilitate and liberalise, and is not meant to impede, the right of inspection. *Indeed, almost unbridled powers are conferred upon the court to give effect to the directors' right of inspection. Clearly, it is within the powers of the court to allow the plaintiffs to furnish a fresh undertaking by the auditor in terms as required by the court, by addressing it to the court and by deleting therefrom the words relating to the appointed servants/agents.* This is especially so after the learned judge had arrived at a specific decision that the defendant had, in the first instance, failed to discharge its burden to show that the plaintiffs' inspection would result in any detriment to the interests of the defendant. *That is a reaffirmation that the right of inspection by the plaintiffs as directors of the defendants pursuant to s. 167(6) is 'absolute'.*
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> (emphasis added)

[20] Low Hop Bing JCA, delivering the judgment of the Court of Appeal also referred to the common law and a leading Singapore Court of Appeal authority on the subject in the following manner:

> [16] The relevant established principles have been succinctly stated by the Singapore Court of Appeal in *Wuu Khek Chiang George*. There, the appellant, a director of the respondent, took out an application under s. 199 of the Singapore Companies Act (equipollent to our s. 167) for an order requiring the respondent to inspect its accounting and financial records. The High Court judge dismissed the application. After reviewing a long line of authorities, the Court of Appeal allowed the appellant's appeal and held, *inter alia*, that:
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> (1) *the right of a director of a company to inspect its accounting and other records is a right existing at common law and is recognised in s. 199 of the Companies Act.* Such right is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company, and as such, like other rights and powers, must be exercised for the benefit of the company. The obligation of the company to allow inspection by its director is mandatory;
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> (2) *this right has been described as being 'absolute'. A director is prima facie entitled to inspection and is not required to demonstrate any particular ground or 'need to know' as a basis: Molomby.* So long as the right is exercised for the proper performance of the director's duties to the company and not with a view to causing any detriment to the company, it is in that sense 'absolute': see eg, *Dato Aw Kow v. Haw Par Bros (Pte) Ltd* [1972] 2 MLJ 225; [1972-1974] SLR 391, *Haw Par Brothers v. Dato Aw Kow* [1973] 2 MLJ 169; [1972-1974] SLR 183; *Leong Sun Wing v. Wah Hup Engineering Works Sdn*

Bhd (No. 2) [1977] CSLR VII [1003]; *Molomby*; *Welch & Anor v. Britannia Industries Pte Ltd* [1993] 1 SLR 673; *Edman v. Ross* (1922) 22 SR (NSW) 351; and *Conway & Ors v. Petronius Clothing Co Ltd & Ors* [1978] 1 All ER 185; [1978] 1 WLR 72;

(3) there is no residual discretion in the court to refuse inspection. Where the court bars a director from exercising his right of inspection, it is not in fact exercising a residual discretion, but is in such an event satisfied on the basis of the evidence before it that the director's intention is to use the information obtained for ulterior purposes such as with a view to causing detriment to the company and that the director is thus abusing the confidence reposed in him; *Berlei Hestia (NZ) Ltd v. Fernyhough* [1980] 2 NZLR 150 per Mahon J;

(4) *the right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but some other ulterior purpose to injure* the company: *Edman v. Ross, Molomby*; *Deluge Holdings Pty Ltd & Anor v. Bowlay & Ors* [1991] 9 ACLC 1486; *Welch & Anor; Re Geneva Finance Ltd (Receiver and Manager Appointed)* (1992) 10 ACLC 668; and *Paul Nicholson lwn Faber Medi-Serve Sdn Bhd dan lain-lain* [2002] 1 MLJ 355.

[emphasis added]

[21] The Singapore Court of Appeal in *Wuu Khek Chiang George v. ECRC Land Pte Ltd* [1999] 3 SLR 65 also affirmed that (having regard to common law and s. 199 of the Singapore Companies Act which is in *pari materia* to our s. 167 of the CA) the obligation of the company to allow inspection by its director is mandatory, and that the right is absolute so long as the right is exercised for the proper performance of the director's duties to the company and not with a view to causing any detriment to the company. A director is *prima facie* entitled to inspection and does not have to show any particular ground as a basis.

[22] There is no conceptual difficulty in this proposition. The directors are accountable under the law to manage the company they serve as directors. If nothing else, plain common sense will dictate that it is inconsistent with that duty if their access to the documents and records of the very company they are bound to manage is restricted. Thus, in *Mirza Mohamed Tariq Beg Mirza HH Beg v. Perunding Pakarmedia Sdn Bhd* [2009] 10 CLJ 273; [2009] 1 MLRH 131 it was also held that a director is not obliged under the law to justify his request to inspect the accounts of the company.

[23] As such, a director's right under s. 167 of the CA to inspect the accounting records is an affirmation of a director's right already existing at common law. A corollary of the absolute right to inspect must mean that the

company is obliged to ensure that such common law and statutory right can be exercised by the director unimpeded. A failure on the part of the company or of other directors to allow the exercise of the inspection rights of the requesting director would constitute an offence and attract the application of s. 167(7) of the CA (s. 245 (9) of the Companies Act 2016). If convicted, the company and the directors in default may be liable to the punishments as I highlighted earlier.

Director's Inspection Right Can Only Be Overridden By Clear Proof Of Ulterior Purpose

[24] Since the basis of the legal right of a director to inspect the books and records of the company emanates from his office as a director to enable him to perform his duties as a director, the same right will be forfeited where it is exercised not to advance the interests of the company but some other ulterior purpose to injure the company (see *Edman v. Ross, Molomby*; *Deluge Holdings Pty Ltd & Anor v. Bowlay & Ors* [1991] 9 ACLC 1486).

[25] And the English Court of Appeal in *Oxford Legal Group Ltd v. Sibbasbridge Services Plc & Anor* [2008] EWCA Civ 387 made the observation that if it is clearly shown that a director was using the right to inspect for an improper purpose, the court has no power to assist him to obtain access. The court could thus not facilitate the right be invoked for a purpose for which it was not conferred. Conversely, it rightfully shall not be open to the court to refuse its assistance if it has no reason to believe, in the absence of clear proof, that the requesting director, like the plaintiff herein, is using the right to inspect for an improper purpose. Thus, it was held:

> Inspection may well not be ordered if a clear *prima facie* case is raised that the information sought will not be used *qua* director and especially if to the detriment of the company; one of many possible examples is where inspection is in effect sought for the benefit of a competitor.

[26] The Court of Appeal in *Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* also made clear that a director's right to inspect the accounting records is absolute in the sense that he is entitled to inspection without subject to any requirement to provide any reason for the inspection. The courts do not even have any residual discretion to refuse inspection by a director. A director's statutory right of inspection may only be refused if the director is exercising his right of inspection for some ulterior purpose or to injure the company.

[27] It would be a complete misconception of the true meaning of the directors' inspection rights if the company seeks to qualify the exercise of such inspection right. It would thus be wholly unwarranted for a company to demand as a condition permitting inspection for the requesting director to execute a non-disclosure or confidentiality agreement precisely by reason of

the trite legal position that the director's fiduciary duties to the company already impose strict duties against any infringement of confidentiality or injury to the company.

[28] Crucially, it is for the company resisting the inspection to demonstrate that the director is exercising his right of inspection for some ulterior or improper purpose or to injure the company. And in order to achieve this, the company must show clear proof that the director is exercising his right for inspection for such improper purposes. Thus, Low Hop Bing JCA in *Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* stated:

> … It is for the defendant to show 'clear proof' and to satisfy the court 'affirmatively' that the grant of the right of inspection would be for a purpose detrimental to the interests of the company. There must be a 'real ground' that the right would be abused and that substantial harm would be caused to the company thereby …

[29] In the instant case, the case of the plaintiff is simple enough. In essence, the plaintiff as a director of the defendant company has an absolute right to inspect the accounting records. But the defendant has denied the plaintiff his statutory rights to firstly inspect the accounting records by his agent, given the defeat at the Board meeting of the defendant company on 7 March 2016 of the plaintiff's proposed resolution for his auditor to inspect the accounting records. In this regard, in support of the application, the plaintiff's agent, being an approved company auditor has provided the requisite undertaking to this court that information acquired during the inspection shall not be disclosed except to the plaintiff.

[30] Secondly, the plaintiff was also refused the right to make copies of the accounting records, as the defendant instead took the position that the plaintiff is only entitled to sight the accounting records at the defendant's office but not make copies thereof.

[31] On the first refusal, as has been made clear earlier, s. 167(1) of the CA plainly gives the court the power to permit access to company records by an approved company auditor, on behalf of the requesting director. A director has the right to access such documents, and by virtue of his office, does not need to provide justification why he seeks access. Instead, it is for the company mounting a resistance to offer clear proof that the inspection is for improper purposes, injurious to the company, or that the exercise of such rights is incompatible with remit of the director's fiduciary and statutory responsibilities. The crucial question therefore is to consider whether the defendant has shown clear proof of such deficiency to justify denial of access, a matter which I will address later in this judgment.

[32] The same burden on the part of the defendant to show clear proof of improper purpose would be relevant to the second basis of refusal, that of the denial of the request by the plaintiff to make copies of company documents. But, I must first deal with this principal ground of their opposition to this application by the plaintiff - which is that whilst the defendant agrees that a director has the right to inspect, the director does not have the right to ask for copies of documents.

Inspection Right Includes Right To Be Given Copies Of Documents

[33] So, does the inspection right encompass the right to ask for copies of the documents? This has been answered in *Edman v. Ross* (1922) 22 SR (NSW) 351 in the affirmative. This Australian case is a leading authority on the director's right in common law to inspect and take copies of the accounting records which in addition may be exercised personally or through his agent, such as his accountant. It was held most instructively as follows:

> *A director's right to inspect and take copies of documents belonging to this company is, I think, clear.*
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> In *Burn v. The London & South Wales Coal Company and the Risca Investment Company* (7 TLR 118), North, J., pointed out that he had this right and not at meetings only. He pointed out the inconvenience that would arise if it were otherwise, and the said that the very object of the director having access to such documents was that he might be prepared to act at meetings. He observed also that it was necessary that confidence should be reposed in a director, that he would use his knowledge for the benefit of the company, and that if a company had not confidence in its directors its proper course was to remove them.
>
> *The right to inspect documents and, if necessary, to take copies of them is essential to the proper performance of a director's duties, and, though I am not prepared to say that the Court might not restrain him in the exercise of this right if satisfied affirmatively that his intention was to abuse the confidence reposed in him and materially to injure the company*, it is true nevertheless, that is exercise is, generally speaking, not a matter of discretion with the Court and that he cannot be called upon to furnish his reasons before being allowed to exercise it. In the absence of clear proof to the contrary the Court must assume that he will exercise it for the benefit of his company.
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> (emphasis added)

[34] Does the same position obtain in this country? The short answer is in the positive. I cannot but hold that the right for copies is integral to and intertwined with the very concept of inspection right itself. Unlike the scope of shareholder's inspection rights, which is more restricted, it is a correct statement of law that in this country the right of a company director to inspect the corporate books and records and access all company information is virtually absolute. This is not difficult to appreciate. As directors are

tasked with the responsibility of managing the business and affairs of the company, it is nothing less than axiomatic that the individual director cannot truly make his full contribution to the management of the corporate business unless he or she is given access to the corporation's books and records.

[35] I would readily make reference to s. 131B of the CA which codified the common law rule pursuant to the Companies (Amendments) Act 2007 which had been introduced to enhance the framework on the duties and powers of directors under the law. It is worthy of emphasis that s. 131B states as follows:

> (1) The business and affairs of a company must be managed by, or under the direction of, the board of directors.
>
> (2) The board of directors has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in this Act or in the memorandum or articles of association of the company.
>
> Section 132. As to the duty and liability of officers.
>
> (1) A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company.
>
> (1A) A director of a company shall exercise reasonable care, skill and diligence with-
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> (a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and
>
> (b) any additional knowledge, skill and experience which the director in fact has.

[36] The law vests the duty of management of the company in its directors, which must be discharged with reasonable care and diligence in the best interest of the company.

[37] A director will be well within his statutory and common law rights to require the company to furnish to the director any information which reasonably concerns a director's responsibilities, to demand that the information be compiled for and be copied to be extended to the director by the employees of the company. And for such purpose, to even have the company bear all expenses.

[38] Information which concerns a director's responsibilities would for all intents and purposes be everything that relates to the company. It is beyond accounting and other records as envisaged under s. 167. Under common law, this encompasses all information pertaining to the company which every director, in his management of the company must be privy to if not familiar

with. This could potentially be everything in the records of the company, but I do not find anything objectionable in legal principle for after all the responsibility for the management of the affairs of the company is statutorily firmly vested in the directors. They are primarily accountable for any company mismanagement before any employees are held responsible. Their failures would attract liabilities for infringement of their fiduciary and statutory duties under the common law and the statute. Directors owe a stewardship obligation to the company, and it is thus quite basic that they could be liable for any improper management.

[39] In other words, given these positive duties and potential liabilities, the law accords company directors a virtually absolute and unqualified right, to inspect the corporate books of the company they are responsible for. This cannot be interpreted as being merely confined to the right of the directors to view documents at a specified place in the premises of the company and not extended to the right to ask for copies be made for the requesting directors. Otherwise, the true essence of the inspection rights is unjustifiably diminished to a considerable degree, whilst being injudiciously oblivious to the heavy management responsibilities shouldered by company directors under the law.

[40] It is not doubted that a director could abuse his inspection rights, but, again, considering the responsibility of company management reposed in the directors by the law, the same law would only limit the exercise of this powers arising from his right of inspection by the deficiencies in the director's own fiduciary and statutory duties of loyalty and care to the company he serves and manages. As stated earlier, a director must exercise his powers solely for the benefit of the corporation. The right of inspection can only be overridden by clear evidence of the director abusing his powers for personal benefit or in any manner inconsistent with the proper purposes of the company. Thus, the company cannot validly seek to protect against hypothetical misconduct on the part of the directors.

[41] The jurisprudential basis for the directors' inspection right therefore equally applies to the right to make copies of the documents so inspected. The latter is but a subset of the former. As directors have an unqualified right to examine the corporate books and records of the company in order not to fall short of the duty of management imposed by law on them, and to fully perform their directing duties, which thus require them to be apprised of the policies, business and affairs of the company, the right to require copies be made and extended to the directors must necessarily be part of their right of inspection.

[42] As a key right for directors is to have adequate information to allow them properly to discharge their obligations to the company, following best practices in corporate governance, large corporations and multinationals can be expected to have in place appropriate protocols or internal guidelines for obtaining information should be included as part of a corporate governance charter and in a director's terms of appointment.

[43] There is also merit in the plaintiff's argument that the right of inspection comes together with the right to make a copy of all such accounting records, as stipulated in s. 359 of the CA which reads as follows:

> (i) (1) Any register, minute book or document of a corporation which is by this Act required to be available for inspection shall, subject to and in accordance with this Act, be available for inspection at the place where in accordance with this Act it is kept during the hours in which the registered office of the corporation is accessible to the public.
>
> (ii) (2) Any person permitted by this Act to inspect any register, minute book or document of a corporation may make copies of or take extracts from it and any officer of the corporation who fails to allow any person so permitted to make a copy of or take extracts from the register, minute book or document, as the case may be, shall be guilty of an offence against this Act.

[44] In my view, s. 359(2) is probably designed more to deal with the inspection rights of members, not directors of the company. But the language employed by the provision, when read literally, can equally apply to the inspection rights of the directors. In any event, it merely states what is already necessarily implicit in the essence of the right to inspect, which is the right to make copies of the documents so inspected. Without the latter, the exercise of the right of inspection would be impaired and rendered not entirely effective.

Defendant Failed To Show Ulterior Purpose

[45] It should be stated that the various affidavits of the parties in dispute in the instant case contain various and many allegations and counter allegations. In this context, it would not be the duty of the court to examine such averments and disputations. This is in line with the decision of the Singapore High Court in *Welch v. Britannia Industries Pte Ltd* [1992] 3 SLR (R) 64, which held as follows:

> … It is not for the Court at the hearing of an application (to inspect accounts and records) to go into the disputes between the contending parties and I will not deal with the charges and counter charges … beyond saying that they show clearly that the plaintiffs were concerned over the company's account before they made the application.

[46] Nevertheless, I shall consider the principal assertions made by the defendants in challenging the instant request. As stated earlier, the resistance mounted by the defendant can only succeed if clear proof is given of the alleged ulterior motive on the part of the plaintiff.

[47] The underlying complaint of the defendant appears to be that this very encl. 1 and by that, I take to mean the request for inspection, by an agent, and for copies to be made, is for the ulterior purpose of pressuring the defendant and its majority shareholder AMSB to continue making payments to NSSB, which following a dispute between the two shareholders, had since stopped.

[48] It is not denied that there were contractual provisions for payments to be made by the defendant and AMSB to NSSB. In pursuance of an agreement for advisory services, there is payment of USD7,000 per month from the defendant to the NSSB; and under a letter dated 9 February 2015, USD100 per day per tugboat from AMSB to NSSB.

[49] On the payment said to be due from the defendant to NSSB, I do not find evidence of any pressure brought to bear by NSSB or the plaintiff on the defendant for the latter to continue with making payments to NSSB. NSSB had merely made the request for the execution of a new advisory services agreement to be executed. As for the payment of advisory fees, NSSB quite categorically stated that NSSB defers to the Board of Directors of the defendant to decide on the matter.

[50] In respect of the payment claimed to be due from AMSB to NSSB, even if assumed to be disputed, is of no relevance to the defendant. That would be an issue between the shareholders.

[51] But more relevantly, both types of payments were said to be due to NSSB, the corporate shareholder; not the plaintiff. The plaintiff is not even a shareholder of NSSB. Any suggestion that encl. 1 is for the personal benefit of the plaintiff is entirely misconceived. Equally significantly, there is no evidence to demonstrate in what manner this purported dispute on payments which does not concern the plaintiff in his capacity as a director of the defendant can amount to an ulterior or improper purpose unrelated to the discharge of the plaintiff's duty as a director of the defendant.

[52] It is worthy of emphasis that mere allegation which is not substantiated with evidential support is patently insufficient to deny the statutorily entrenched inspection rights of company directors. The law requires no less than clear proof. Again, I reiterate that the Court of Appeal in *Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* [2008] 1 LNS 741; [2009] 2 MLJ 527 stated thus:

> It is for the defendant to show clear proof and to satisfy the court affirmatively that the grant of the right of inspection would be for a purpose detrimental to the interests of the company. There must be a real grounds that the right would be abused and that substantial harm would be caused to the company thereby ...

[53] The defendant proffered a myriad, if not, motley of other reasons, some implicit but mostly expressly made, in support of its resistance to encl. 1. They mainly attack the merits of the plaintiff's application, as opposed to proffering proof of improper or ulterior purposes. I find each and every one of them lacking in substance, and in any event far from furnishing clear proof of any ulterior motives or purposes unrelated to the exercise of director's duties.

[54] As such, the defendant's suggestion that the plaintiff is not entitled to encl. 1 because he is a foreign national who resides overseas, or that the plaintiff is non-executive and also merely a corporate representative of NSSB is entirely devoid of merit. The law, as so clearly encapsulated in ss. 131B and 132 of the CA does not make a distinction on the powers and duties of company directors on the basis of nationality, residence, or whether the director is performing an executive role or otherwise, or whether the director is a nominee or a corporate representative of a shareholder. It is a fundamental principle of company law that the right to inspect emanates from the plaintiff's office as a director of the defendant company. Directors of a company enjoy the same right of inspection under the law. The law admits of no distinction between the statutory and fiduciary duties owed by different categories of directors.

[55] The defendant claimed that the plaintiff did not have meritorious issues regarding the company's financial accounts. On 23 October 2015, the defendant circulated its draft accounts as at 30 September 2015, which were to be audited. The plaintiff raised queries in his email dated 30 October 2015 and later sent another email on 13 November 2015 but this time, according to the defendant, not concerning the company's accounts. The plaintiff also only raised queries on financial issues a month subsequent to the Board of Directors meeting, which thus shows that the plaintiff did not have any pertinent issue to raise on the accounts ended 31 July 2015.

[56] But the plaintiff was able to show by way of affidavit evidence that the defendant's draft accounts as at 30 September 2015 had not been approved by the Board when the plaintiff posed the preliminary questions on 30 October 2015, and the final questions on 18 December 2015. Instead, the draft accounts as at 30 September 2015 were only approved on 7 March 2016 by the Board by way of majority vote, despite the plaintiff and Dato' Wan Mohamed Yaacob (the one other nominee director of NSSB)'s request for deferment until the defendant's reply to the final questions. The plaintiff and Dato' Wan abstained and did not vote to approve.

[57] This appears to be the principal gripe of the plaintiff. The plaintiff maintains that the defendant's accounts for the financial year ended 30 September 2015 is the one that warrants closer examination since it recorded revenue in excess of RM34 million and expenses almost RM15 million whilst for the previous two financial years, the defendant had yet to generate income.

[58] There is a Court of Appeal authority in the case of *Soo Boon Siong v. Saw Fatt Seong & Soo Hock Seong & Ors* [2008] 1 CLJ 365; [2008] 1 AMR 293 which held that the fact that the director had signed documents concerning the audited accounts including the directors' reports is not conclusive of the validity or truthfulness of the accounts. Thus, a director who has approved the company's audited accounts is still entitled to challenge the correctness of such audited accounts. In the instant case, the plaintiff did not even vote to approve the audited accounts of the defendant.

[59] The defendant also asserted that the plaintiff had acted in bad faith by adducing different versions of the minutes of the Board meetings of the defendant. But the plaintiff's riposte is that the minutes drafted by the defendant were inaccurate in that there were two substantially different versions of the final signed minutes for the meeting of 27 May 2015 and another two different versions of draft minutes for the meeting on 19 August 2015. The plaintiff actually prepared *ad verbatim* transcription of the minutes to ensure greater reliability. Neither has the defendant pointed out any significant inaccuracies in the minutes furnished by the plaintiff. It is thus unsurprising should the different versions of minutes of Board meetings, and the inaccuracies in the draft minutes of Board meetings, give rise to suspicion on the part of the plaintiff on the accuracy of the defendant's financial records.

[60] The defendant further contended that whatever questions the plaintiff has regarding the defendant's accounts should be raised at Board meetings, and not be by way of emails to the defendant's CEO.

[61] But it is trite that a director's right to inspect is unbridled, and certainly not conditional upon any prior approval by the company's Board approval. There is no necessity for an action for inspection by one director must be joined in or supported by any other director. Every company director is individually entitled under the law to exercise the right of inspecting the documents of the company. There is absolutely no necessity to call for a Board meeting as a condition precedent to filing encl. 1. In any event, the plaintiff's questions were in fact directed to the entire Board of Directors of the defendant, for the emails attaching the preliminary questions and the follow-up questions were addressed to the CEO and copied to all the other directors of the defendant company.

[62] Further, when partially replied to, the answers were given by the defendant's CEO, and not by the Board of Directors at any Board meeting. The defendant and its entire Board of Directors have been aware of the follow-up questions since 1 April 2016 but the defendant chose not to answer the follow-up questions. A

[63] At the Board meeting on 7 March 2016, the defendant did agree to answer the final questions, which were posed on 18 December 2015, more than three months after the questions were posed. Even though the defendant replied to the final questions by email dated 11 March 2016, it did not supply a copy of the specific accounting records requested for. Instead, the defendant insisted that the plaintiff's right is limited to viewing the accounting records at the defendant's premise, but not making a copy thereof. And the follow-up questions posed by the plaintiff have not been answered thus far, and the defendant continues to refuse the plaintiff's right to a copy of the accounting records. B C

[64] This is, in any event, not a case where only one director is insisting on exercising his inspection rights. Dato' Wan had also at the same Board meeting on 7 March 2016 requested for his own auditor to inspect the accounting records. The request suffered the similar fate as that made by the plaintiff. Both were denied. In addition, Dato' Wan had also affirmed an affidavit to express his support for the plaintiff's instant application. D E

[65] Another of the defendant's argument, that the plaintiff demanded for but did not attend the AGM to raise questions about the defendant's accounts is similarly unconvincing. The AGM is for members of a company to deliberate on the accounts. It is not a forum for directors of the company to challenge the same. The plaintiff's explanation that he did not attend the AGM on 31 March 2016 is entirely reasonable, because the defendant only fixed the date for the AGM a day before, on 30 March 2016, by which date the plaintiff was already overseas, as had been communicated to the defendant. The plaintiff and Dato' Wan did not attend the adjourned AGM on 7 April 2016 because according to them, the AGM had been improperly convened without prior Board approval. F G

[66] The crux of the matter is that the defendant is resisting the making available of company documents to the plaintiff, one of its own directors.

[67] Such right cannot however be defeated by any allegation of the exercise of such legal right on the part of the director to be excessive or uncertain, unless this also amounts to an improper purpose. In the instant case, the relief sought for by the plaintiff as set out in prayer 1 is in consonant with the accounting records maintained and kept by the defendant as required by law pursuant to s. 167(1) of the CA. Prayer 2, which seeks the defendant make copies of documents, is limited to specific documents as expressly H I

listed in Annexure B to encl. 1, as set out earlier. It is not, as suggested by the defendant, that the plaintiff seeks to have an exact mirror set of the entire company documents and records of the defendant. Additionally, as highlighted by the plaintiff, prayer 4 of encl. 1 is for "liberty to apply", which the defendant could resort to should it encounter problems in adhering to the reliefs, if granted.

[68] The burden to show clear proof is manifestly on the defendant to discharge. Despite the defendant raising various complaints, none however has been shown to even remotely come close to constitute any form of clear evidence of improper or ulterior motive on the part of the plaintiff that could justify denial of inspection rights under s. 167(3) in encl. 1.

[69] In *Law Wai Duen v. Boldwin Construction Co Ltd* [2001] HKCA 284 the Court of Appeal of Hong Kong stated:

> Hence, in relation to many matters directors will no doubt rely upon what is done by company officials and their fellow directors in relation to the affairs of a company. But that is not the say that the ultimate responsibility does not lie upon the director. If a director has cause to be suspicious, or reasonably believes there is such cause, *then the director may incur liability if he does not satisfy himself in relation to all matters relating to the company's affairs. More importantly, even if a director does rely upon other directors or company officials in the conduct of the company's affairs, he must, at all times, be at liberty to satisfy himself as to any matter in relation to the company's business.*
>
> (emphasis added)

[70] It is not unreasonable a contention to make that denial of access to information on company records would have the impact of affecting, in adverse fashion, the ability of a director to properly exercise his discretion in the discharge of his director's duties to act in the best interest of the company. As such, in the instant case, complaints about the company having to make voluminous copies of documents, to bear the expenses incurred, or to deal with a difficult or even hostile director would merely be an ancillary, and distant secondary consideration which cannot in the slightest justify the displacement of the inspection rights of company directors under the law.

[71] Such right is unfettered. It is unbridled and almost absolute, and it can only be denied in the presence of clear proof that the request to inspect (and make copies) is by reasons unrelated to the discharge of director's duties. And if proven, denial of inspection is founded on the absence of jurisdiction on the part of the requesting director to make the inspection since the purpose is unrelated to his duties under the law. Again, in the instant case, there is nothing in the submissions or affidavits that points towards any factors that could be argued to exhibit clear proof that the inspection request was not for the purposes of the discharge of the plaintiff's director's duties.

[72] It is not easy to demonstrate clear proof. Even the fact that a director has set up a competing company does not *ipso facto* indicates that he would be using the accounts and records of the company for the ulterior purpose of benefiting the former (see the High Court decision in *Mageswary Kannaiah v. Vithylingan Mayandy & Anor* [2009] 9 CLJ 40). It needs no reminding that in the instant case, there are no similar allegations. What have been alleged however are either keenly disputed, or already credibly rebutted by the plaintiff.

[73] The facts of this case clearly demonstrate that the relationship between the two groups of directors has deteriorated. They appear to be suspicious of one another. In encl. 1, the plaintiff seeks to inspect various documents of the accounting records on financial transactions of the defendant company. He appears to suspect something is amiss with the financial records. As a director, I reiterate that the plaintiff does not have to justify why he needs to examine the records.

[74] But his suspicions on the financial records may even compel him under the law, in the discharge of his fiduciary and statutory duties, to undertake the requisite inspection. His failure to do so may open him to charges of breaches of director's duties, apart from the failure of the company and the directors to keep proper records under s. 167(1), as may be punished under s. 167(7) of the CA as referred to earlier. I again emphasise that as a corollary, a failure on the part of company or any of its directors in permitting the exercise of inspection rights under s. 167(3) is also an offence under s. 167(7) of the CA.

Inspection Right May Be Exercised By An Agent For The Director

[75] The key prayer in encl. 1 is for the plaintiff's own auditor to undertake an inspection on behalf of the plaintiff as permitted under s. 167(6) of the CA. It is well within the plaintiff's right to make such application, more so as he is not an auditor and thus requires the assistance of an approved company auditor to conduct the inspection of the defendant's accounting records. A director is not required by law to be a qualified accountant, and even a director who is an accountant is entitled to rely on the assistance of another accountant (see the High Court decision of Balia Yusof JC (as he then was) in *Loh Yoon Sang v. Ivory Pearl Sdn Bhd* [2003] 7 CLJ 405). Thus, the defendant's suggestion that the plaintiff had admitted that he was incompetent to perform his role as a director is wholly misconceived.

[76] Section 167(6) of the CA clearly envisages such assistance to be extended to company directors in the exercise of inspection rights. Again, I refer to *Edman v. Ross* [1922] 22 SR (NSW) 351 which stated thus:

> Having the right then to inspect documents and to take copies, is there anything in the reason upon which the right rests to suggest that it must be exercised personally? I think no. As Stirling, L.J., pointed out in *Bevan v. Webb* [1901] 2 Ch. 59 at p. 77 the general rule of law is that whatever a person, who is *sui juris*, can do personally he can also do through his agent, and reason and common sense suggest that in view of the fiduciary position which a director occupies he should be entitled to call in the aid of a competent agent if he considers that skilled assistance is necessary to enable him to discharge his duties. A director is not required to be a skilled accountant, and it is not expected of him that he should keep the books of the company himself. He is entitled to leave the details of management to other officers and he is protected from responsibility if he has no reason for suspecting the integrity and competence of those whom he employs. If, however, for his own information and in order to satisfy himself that things are as they should be, he wishes to inspect matters for himself he is within his rights, and if he can do this and can take copies which he may afterwards submit for the consideration of a skilled accountant there is no reason why he should not employ a proper agent to make the inspection and examination for him. There may be exceptions to the rule that what one may do personally, if *sui juris*, one may do through an agent, but I cannot see any reason for supposing that a director's right to inspect to one of the exceptions, and it is easy to see that so to limit it might defeat its object.

[77] It should be added that the plaintiff's allegation on accounting irregularities in the defendant's audited accounts for the year ended 30 September 2015, concerning the classification of accrued liabilities in excess of RM3 million as contingent liabilities (thus incorrectly inflating profits) is also supported by the plaintiff's auditor's affidavit affirmed on 30 September 2015, and equally significantly, not rebutted by the defendant or its auditor.

[78] Section 167(6) is widely drafted. It seeks to give full force to s. 167(3). The former is not in any legitimate fashion bridled or qualified by any of the considerations submitted by the defendant. Thus, there is no requirement for there to be any prior challenge on the conduct of the company's auditors. Nor is inspection inapplicable to accounts which have already been audited.

[79] And it is entirely up to the director to make his choice of his own auditor, who in the instant case is Mr Chan Kuan Chee, a partner at Crowe Horwath. This is a personal appointment of an agent by a director, and not by the company. The defendant raised the objection in that another partner of Crowe Horwath had been reprimanded and fined by the Securities Commission of Malaysia. But there is no evidence of any impropriety as against Mr Chan.

[80] The defendant's other contention is that the plaintiff has violated his duties of confidentiality by disclosing the defendant's accounts to Crowe Horwath. Again, I find this to be untenable. It is quite trite that in the discharge of his statutory and fiduciary duties as a director of the company, a director is well within his remit and fully entitled in law to seek personal independent professional advice and refer the company's documents to his professional agents for such purpose. As ruled in *Edman v. Ross* [1922] 22 SR (NSW) 351:

> If … he wishes to inspect matters for himself he is within his rights, and if he can do this and can take copies which he may afterwards submit for the consideration of a skilled accountant …

[81] There is nothing irregular, let alone unlawful about the plaintiff referring the defendant's accounts to Crowe Horwath for advice, which relationship between the parties is also in any event governed by client confidentiality.

[82] Allegation of biasness on the part of Mr Chan or Crowe Horwath is both irrelevant and inconsequential. There is also no evidence that information on the defendant's accounting records has been divulged to any third party. Neither has the defendant shown how the appointment would prejudice the defendant who plainly has the similar right to rebut the opinions of Crowe Horwath but the defendant has chosen not to do so thus far. Neither has the defendant initiated any other counteraction for any alleged breach on the part of the plaintiff or Crowe Horwath.

[83] As an aside, it is of some significance to note that the reliefs prayed for by the plaintiff in encl. 1 are similar to those prayed for and indeed obtained by Mr Suresh Emmanuel Abishegam, who is the CEO and director of the defendant, and who is also the officer authorised to affirm all of the affidavits filed on behalf of the defendant to oppose encl. 1 herein. He was successful in enforcing his director's inspection rights when obtaining an order on 24 November 2016 as against another joint venture company between the shareholders, this time, Nautilus Perak Marine Services Sdn Bhd ("NPMS").

[84] It must be added that in that suit, Mr Suresh Abishegam took a diametrically opposite stance *vis-à-vis* the instant suit in having argued, successfully, that his right as a director of NPMS includes the right to have an accountant as his agent to undertake the inspection which also extends to the right to take copies of company documents.

[85] Having regard to the circumstances of this encl. 1, I find sufficient bases to grant the application under s. 167(6) for the appointment of the identified and proposed auditor to assist the plaintiff in the exercise of the latter's inspection rights inclusive of the right to take copies of documents, subject to the requisite confidentiality undertaking.

A **Additional Observations On Principles Governing Director's Inspection Rights**

[86] It is plain from the words in s. 167(1) of the CA (s. 245(1) of the Companies Act 2016) that the duty to keep accounting records is imposed on not just the company but every director and manager of the company. Given the common law and statutory inspection right in s. 167(3), a denial of such right may even permit action be taken by the requesting director against his fellow directors in addition to against the company, more so as s. 167(7) too refers to the liability of every officer (in addition to the company) for any infringement of s. 167 of the CA.

[87] As the law firmly recognises that the directors' stand in a fiduciary relationship to the company they serve, this virtually unqualified right of inspection under the statute and common law is manifestly in aid of such principle. For it is a prerequisite to the proper discharge of the statutory and fiduciary duties of good faith, care, skill and diligence.

[88] By virtue of holding the office of a director of a company, once the director makes a request under s. 167 (s. 245 under the Companies Act 2016) or the common law, which the director does not need to provide justification for, as the law presumes it to be made in the best interest of the company, but which request is however declined by the company, a *prima facie* demonstration of the director's entitlement to the documents has been established. For in all cases of refusal, all that a director needs to demonstrate in order to enforce his inspection right is that he or she is a director of the company, that as a director, he or she has demanded inspection, and that the right has been refused.

[89] The burden then shifts to the company to rebut the presumption of the request being in the best interest of the company or made in the discharge of director's duties, by showing clear evidence of impropriety in the director's purpose or which is unrelated to the discharge of director's duties that could justify denial of inspection of the documents, and with it requests for copies of such documents, as well as the right to appoint an agent or auditor on behalf of the director to perform the inspection.

[90] There is no residual discretion on the part of the courts in evaluating an application for inspection. It is either the inspection is in the proper discharge of director's duties or it is not. If it is the former, which is presumed in all cases, the exercise of the right of inspection must be allowed. If the latter, which must be borne out of clear proof of impropriety in relation to the request (thus rebutting the presumption), inspection must be denied, because otherwise the court would be facilitating an abuse and breach of director's statutory and fiduciary duties, which the courts must never countenance.

[91] A company which nevertheless insists on refusing the exercise of such inspection despite not being able to provide clear proof to justify refusal, commits an offence and if convicted runs the risk of being liable to the punishment for the contravention as stipulated in s. 167(7) of the CA.

[92] It would not be an unwarranted extension of the principle allowing inspection rights that such a right of inspection may be characterised as not merely a right, but even a duty. In certain circumstances, especially when there are reasons to suspect that all is not well with the financials of the company, directors, being responsible for the management and well-being of the company, are duty-bound to make the necessary inquiries and to address any deficiencies, in the best interest of the company.

[93] The fact that a director may be hostile towards the company or its staff does not limit the inspection right and the right to take copies. The mere possibility of abuse or misuse of the right does not afford any ground for its denial or restriction. A director retains this right of inspection (inclusive of the right to be supplied with copies of documents so inspected), despite mere allegations that he is hostile, adverse or a competitor of the corporation, for as long as he remains a director of the company.

[94] Without clear evidence to such effect, attempts to restrict such rights will not withstand judicial scrutiny. Otherwise, refusal of inspection and taking of copies could lead to a corresponding dilution of accountability on the part of the directors, resulting in an unwarranted and dangerous inroad into the sacrosanct principle of directors' duty of management in company law.

Conclusion

[95] In view of the foregoing reasons, it is my judgment that the plaintiff has clearly established his case on a balance of probabilities to the reliefs prayed for in encl. 1, which is hereby allowed, with costs.